IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

PORFIRIO PINEDA-MARIN, MARGARITO CAMACHO-OLIVA, CATALINO MORGA-COLON, and FELIPE ROJO-GARCIA, Plaintiffs, v. CLASSIC PAINTING INC. d/b/a PRO CLASSIC COATINGS, an Oregon corporation; GEOFFREY EDMONDS, individually; PRO KOTE INC., an Oregon corporation; PRO KOTE LLC, an Oregon limited liability company; SHERWIN THINGVOLD, individually; and SHELDON THINGVOLD, individually, Defendants.	No. CV-08-798-HU FINDINGS OF FACT & CONCLUSIONS OF LAW

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HUBEL, Magistrate Judge:

Plaintiffs bring this wage-related action against defendants, contending that defendants failed to pay them overtime wages and minimum wages, in violation of federal and state statutes. They also bring a separate Oregon statutory claim for failure to pay wages upon termination, and a breach of contract claim, both based on the same conduct as the overtime and minimum wage claims.

All parties have consented to entry of final judgment by a Magistrate Judge in accordance with Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I conducted a court trial on February 9 and 10, 2010. Before trial, plaintiffs and defendants Classic Painting and Geoffrey Edmonds stipulated to the entry of judgment against those defendants. Thus, Classic Painting and Edmonds made no appearance at the trial. The following are my Findings of Fact and Conclusions of Law. Fed. R. Civ. P. 52(a).

FINDINGS OF FACT

All four plaintiffs are painters. All speak Spanish and so little, if any, English, they testified through an interpreter who also translated the proceedings from English to Spanish for plaintiffs. Before 2005, plaintiffs were all employed by Pro Kote,

Inc., which became Pro Kote, LLC. Both of these entities were painting companies owned and operated by the Thingvolds.

Sometime in early 2005, the Thingvolds decided they no longer wanted to own their own business. Thus, in the spring of 2005, they entered into an "arrangement" with Edmonds and Classic Painting, Edmonds's company. The nature of that arrangement is disputed, with the Thingvolds contending that they and plaintiffs became employees of Classic Painting, and plaintiffs contending that the Thingvolds were joint employers with Edmonds and Classic Painting for purposes of the wage statutes.

I. Transition from Pro Kote to Classic Painting

Morga-Colon, Camacho-Oliva, and Rojo-Garcia started working for Pro Kote in July or August 2003. Pineda-Marin did not testify when he started working for Pro Kote. Rather, he responded in the affirmative to counsel's question that he was employed continuously from June 2005 through February 2008. The obvious issue in this case is "who" employed plaintiffs. Notably, this question by counsel did not ask Pineda-Marin who employed him during this time.

None of the plaintiffs provided detailed information about the transition from being employees of Pro Kote to being employees of Classic Painting. Morga-Colon indicated that he knew of the change because his pay checks were different. While working for Pro Kote, his paychecks did not show the name Pro Kote. He testified that beginning in October 2005, however, his check stubs had the name of Classic Painting or Pro-Classic Painting. Exhibit 2 reveals that pay stubs bearing Morga-Colon's name, beginning in October 2005 and continuing to October 2006, bore the name "Classic Painting • dba Pro-Classic Coatings." Exh. 2 at pp. 6-12. The same exhibit shows

that Morga-Colon's pay stubs beginning in October 2006 and continuing to December 2007, bear the name "Classic Painting" only. Id. at pp. 12-23. There are other pay stubs prior to October 2005 that reveal no employer name. Id. at pp. 1-5. Check stubs for the other three plaintiffs are similar. Exh. 1 (pay stubs for Camacho-Oliva), Exh. 3 (pay stubs for Pineda-Marin)[1], Exh. 4 (pay stubs for Rojo-Garcia).[2]

Morga-Colon earned $12 per hour at Pro Kote and continued to earn $12 per hour at Classic Painting. He later received a raise while working at Classic Painting. Morga-Colon stated that the Thingvolds made the decision about the raise.

Camacho-Oliva indicated that he learned about the change in employment when "they," presumably referring to the Thingvolds, said they were going to be associated with Edmonds. He could not remember the date. He noted that Sherwin Thingvold brought "us" a new application. He further explained that at that time, Sherwin Thingvold told him that everything, including his wages, was going

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[1] During his testimony, Pineda-Marin noted that the March 2005 and April 2005 pay stubs on page 14 of Exhibit 3, both of which reveal no employer name, came from Pro Kote but, he added, "you could say that they come from Pro Classic because they don't even have a name."

[2] At the beginning and end of the relevant time period, Edmonds's company used the name Classic Painting, and for some period of time in the interim, used the name Classic Painting, dba Pro Classic Coatings. According to undisputed testimony by the Thingvolds, Edmonds added part of the Pro Kote name to the Classic Painting name for a period of time to appeal to former Pro Kote contractors.

During the trial, witnesses referred to Edmonds's company in a variety of ways, including the name "Pro Classic." For simplicity, I use Classic Painting to refer to Edmonds's company, regardless of the time period at issue.

to remain the same. His pay rate of $12 per hour at Pro Kote remained the same at Classic Painting. A few months "after they united with Pro Classic," his pay went to $13 per hour. No one spoke to him about the raise.

Rojo-Garcia testified that he began working for Pro Kote in August 2003 and he first learned of Geoffrey Edmonds when Edmonds "got together" with the Thingvolds. He stated that he worked for Edmonds's company. He gave no date and no other information about the transition other than to say that he earned $10 per hour while at Pro Kote and continued to earn $10 per hour from Classic Painting.

Pineda-Marin also worked for Pro Kote and then worked at Classic Painting. Other than that, he gave no testimony about how he learned of the transition. He earned $13 per hour when he worked for Pro Kote and continued to earn $13 per hour when he started at Classic Painting. Later, he received a raise to $15 per hour.

Sherwin Thingvold testified to the history of his company, its change from Pro Kote, Inc., to Pro Kote, LLC, and the fact that Pro Kote, LLC no longer exists. None of this testimony is disputed. He described how he and his brother tired of running their own company, including the headaches of dealing with employees and contractors. He noted that owning a company meant putting in twice the time and getting paid half as much.

He testified that the Thingvolds quit working with Pro Kote, LLC at the end of the first quarter of 2005. Although this would put the time at the end of March 2005, Pro Kote's check register indicates that the time was possibly mid-April 2005. Exhibit 503

is a copy of Pro Kote's check register. After a check written on April 18, 2005, a line appears across the register with an arrow and a note that says "Pro Classic." Exh. 503 at p. 7. The next entry below that line is a check written on May 18, 2005. Id. Sherwin Thingvold testified that he drew the line to separate the time from when "we were Pro Kote to the time we started working for Geoff Edmonds and Classic Painting."

Before the transition, plaintiffs were Pro Kote employees. The Thingvolds knew Edmonds as a "friendly" competitor. When the Thingvolds ended their business, they became employees of Classic Painting. The Thingvolds were paid a salary, with Sherwin earning $2,000 per month for about thirty hours of work per week, and Sheldon earning $3,000 per month, and later, $4,000 per month. Sherwin Thingvold explained that at the time, Pro Kote, Inc. owed some back taxes and he was attempting to work out an offer and compromise with the Internal Revenue Service. Thus, he was interested in keeping his wages down, and because his wife made "a lot of money," he took only $2,000 per month in salary.

According to Sherwin Thingvold, Edmonds hired Pro-Kote's employees because Classic Painting took on new jobs with contractors who were previously Pro Kote's clients. Sheldon Thingvold recommended that Edmonds hire plaintiffs. Sheldon Thingvold stated that Edmonds just "picked up" plaintiffs' wages.

Sherwin Thingvold testified that in April and May 2005, the Thingvolds told plaintiffs that the Thingvolds were no longer their employer. They had meetings and asked the employees, including plaintiffs, to bring two pieces of identification for Edmonds to use in filling out certain forms. Sherwin Thingvold explained that

the Thingvolds told the employees that they were going to try and make the transition as smooth as possible with little change in the day to day work. According to the Thingvolds, they explained that Edmonds was the sole owner and that plaintiffs were employees. The Thingvolds' statements were translated into Spanish for plaintiffs.

Gregory Bensberg testified that he began working for the Thingvolds shortly before the transition to Classic Painting occurred, in April 2005. He attended a meeting with the Thingvolds a couple of weeks after he started working for them. At least three of the plaintiffs, whom Bensberg identified as Camacho-Oliva, Morga-Colon, and Pineda-Marin, were present. The purpose of the meeting, according to Bensberg, was for the Thingvolds to tell Pro Kote employees that they would no longer be working for Pro Kote. He indicated that because there were other job sites, some employees were not present at this particular meeting. According to Bensberg, the Thingvolds repeated numerous times to plaintiffs that the Thingvolds were no longer their employers.

While the actual date that Pro Kote, LLC ceased to be plaintiffs' employer is a bit unclear, the evidence presented in the trial indicates that it was sometime in the spring of 2005.[3] I base this finding on the specificity of the Thingvolds' testimony and their ability to recall the precise time at which they no longer employed plaintiffs, as well as the documentary evidence of Pro Kote's checkbook which supports the Thingvolds' testimony, and Bensberg's testimony which also corroborates the Thingvolds'

[3] Agreed Facts in the Pretrial Order indicate that Morga-Colon, Camacho-Oliva, and Rojo-Garcia were employed by Pro Kote through September 2, 2005. I address this below.

testimony. In contrast, none of the plaintiffs pinpointed a particular date or month in which the transition occurred.

Although Morga-Colon disputed that he attended a June 2005 meeting in which the Thingvolds told him that they and Pro Kote were no longer his employer, Camacho-Oliva mentioned filling out an application and being told that everything was going to continue the same. This is consistent with the Thingvolds' testimony that there were forms at these meetings and that they reassured Pro Kote employees that things would remain much the same. I find the Thingvolds' and Bensberg's testimony on this issue more complete in detail than plaintiffs' testimony. To the extent plaintiffs' testimony is inconsistent, I find the Thingvolds' and Bensberg's testimony more credible.

Undisputed facts regarding the transition by the Thingvolds from Pro Kote to Classic Painting are that the Thingvolds received no ownership interest in Classic Painting either at the time of the transition or any time thereafter, the Thingvolds were not corporate officers of Classic Painting, the Thingvolds owned no stock in Classic Painting, they received no compensation for bringing business to Classic Painting, they had no check signing authority for Classic Painting, they have never had any type of joint banking account with Edmonds or Classic Painting, and they have never owned any real or personal property with Edmonds or Classic Painting.

Finally, the evidence establishes that the Thingvolds determined plaintiffs' wages while plaintiffs were employees of Pro Kote and that Edmonds continued paying plaintiffs those same wages upon becoming their employer most likely at the recommendation of

the Thingvolds. The evidence does not show that the Thingvolds affirmatively set the plaintiffs' hourly wages at the inception of their employment with Classic Painting, other than this recommendation which the record supports was adopted by Edmonds as his own decision.

II. Employment at Classic Painting

Plaintiffs' testimony regarding the nature of the work and supervision at Classic Painting was consistent. They stated that the Thingvolds assigned them to various projects and instructed them where to report to work, that the Thingvolds determined who received work and who did not when work was slow, that workers continued to use some of the Thingvolds' equipment on jobs for Classic Painting, that the Thingvolds supervised them at job sites, that they reported their work hours to the Thingvolds, that problems with pay were brought to the attention of the Thingvolds, and that Sherwin Thingvold hand-delivered their paychecks to them.

Pineda-Marin testified that some of his paychecks were signed by Sherwin Thingvold and some were signed by Edmonds. But, he was unable to state when that change occurred. Rojo-Garcia stated that "at the beginning," the signature on his paychecks seemed to be Sherwin Thingvold's. At some point, he continued, it changed but he did not indicate when. Page 1 of Exhibit 4 is a check made out to Rojo-Garcia, dated January 8, 2008, bearing the name Classic Painting. Exh. 4 at p. 1. It is signed by Edmonds. Id.

Morga-Colon could not recall who signed his paychecks during the period June 2005 to January 2008. Camacho-Oliva initially testified that he did not know who signed the pay checks associated with the pay stubs in Exhibit 1. Then, he stated that it seemed to

him that those appearing on pages 1 through 4 of the exhibit were signed by Sherwin Thingvold. However, he then conceded when asked to look at page 3, containing pay stubs dated in June and July 2005, that he did not, in fact, know who signed the paychecks associated with those pay stubs.

Plaintiffs conceded that employees other than the Thingvolds sometimes supervised crews at particular job sites. While some were reluctant to label the position a "supervisor," they agreed on something akin to "team leader." Plaintiffs named several other individuals who, at one time or another, or at one job site or another, were supervisors or team leaders, including Luis Duran, Gabriel Zabala, and plaintiff Pineda-Marin. Morga-Colon indicated that when these individuals were in charge of a group, they supervised and directed him in regard to his work. Camacho-Oliva noted that he functioned as a crew leader or foreman on a couple of jobs. Pineda-Marin considered himself a team leader on certain jobs and in that role, he instructed workers on how to do their jobs. Morga-Colon and Camacho-Oliva both testified that the Thingvolds supervised the work of the various team leaders.

Plaintiffs did not dispute the Thingvolds' testimony that neither Sherwin, nor Sheldon Thingvold believed he had the authority to hire, fire, or discipline plaintiffs or other Classic Painting employees. The Thingvolds stated that Edmonds retained authority over those matters. There also appears to be no dispute that neither Thingvold had any responsibility for maintaining hourly work records for plaintiffs.

Although Morga-Colin indicated that the Thingvolds made the decision to raise his hourly wage while he worked at Classic

Painting, Camacho-Oliva and Pineda-Marin did not specifically state who was responsible for the raises they received after they went to work at Classic Painting.[4] In contrast, the Thingvolds testified that Edmonds made the decision to issue pay raises to the three plaintiffs who received them. Sherwin Thingvold noted that Edmonds may have asked him for his input or opinion, but the final decision belonged to Edmonds. Sheldon Thingvold confirmed that he had no voice or decision-making authority in regard to the raises.

Sherwin Thingvold testified that when he began working for Classic Painting, he acted as a liaison between the contractors that had previously hired Pro Kote, and Edmonds, because the contractors knew the Thingvolds and trusted them. Sherwin Thingvold described traveling to various job sites which were manned by different crews and communicating between the contractor and the supervisor at the job site regarding what needed to be done, what the schedule was, what materials needed to be ordered, and what equipment was needed. Then, he would turn the job over to the on-site job supervisor. Such supervisors included Duran, Camacho-Oliva on a couple of occasions, and Zabala. Sherwin

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[4] In response to various questions by counsel, Pineda-Marin testified that his wage while working at Pro Kote was $13 per hour, that he started at Classic Painting at $13 per hour, and that he later received a raise to $15 per hour while working at Classic Painting. In response to another question by counsel inquiring who decided how much Pineda-Marin would be paid, Pineda-Marin simply responded that Sherwin Thingvold made that decision. Because counsel neglected to pinpoint the time period at issue for this question, it is not clear from Pineda-Marin's testimony if he meant that Sherwin Thingvold made pay rate decisions while Pineda-Marin was a Pro Kote employee, a Classic Painting employee, or while an employee of either company. This failure to tie the testimony to a particular time period was a frequent problem during the trial.

Thingvold also noted that Edmonds already had, as part of his own original crew, his son Geoff Junior, and two other employees as on-site job supervisors.

Sherwin Thingvold stated that for the first several months of his employment with Classic Painting, he collected employee hours from the on-site job supervisors. He tired of this practice, however, because the hours were in Spanish and it took time to sort it out. At some point, Sherwin Thingvold and Edmonds decided that all employees should turn their hours into Duran who translated all of it from Spanish into English. Sheldon Thingvold did not collect work hours for his crew and stated that his crew had to turn over their work hours to either Sherwin Thingvold or Duran. Pineda-Marin testified that he had turned his work hours into Duran on occasion.

The Thingvolds explained that some of their equipment, such as pumps, sprayers, and ladders, was used after they became employees of Classic Painting. Sherwin Thingvold stated that because of the influx of new employees to Classic Painting, Edmonds did not have enough equipment of his own initially, so they used some of the Thingvolds' equipment. Additionally, Sherwin Thingvold noted that Sheldon Thingvold preferred using equipment he was familiar with. Edmonds and Classic Painting took no ownership interest in the equipment and the Thingvolds received no compensation for the use of the equipment. Classic Painting paid for repairs to the Thingvolds' equipment when it broke down. The Thingvolds still have some of the equipment.

Although Sherwin Thingvold testified that he drew a line in Pro Kote's check register sometime after April 18, 2005, as a way

of showing when the Thingvolds began to work for Classic Painting, Sherwin Thingvold explained that on a few occasions after that date, he wrote a check to a former Pro Kote employee from the Pro Kote checkbook because the employee needed an advance or draw, on his paycheck.

As Sherwin explained it, at the time he and Sheldon Thingvold became employees of Classic Painting, the Thingvolds did not close out the Pro Kote bank account because Pro Kote was still expecting retention payments for their previous work and other deposits. They also still had outstanding bills to pay. He kept the account open, but checks to employees written after the April 18, 2005 date were written on behalf of Classic Painting.

The check register, Exhibit 503, which starts with a check written in January 2005, shows that before April 15, 2005, Pro Kote wrote occasional draw checks to its employees, including some to plaintiffs. After April 18, 2005, Pro Kote wrote six draw checks, including one to Morga-Colon, and one or two to Pineda-Marin. Exh. 503 at pp. 7-10. The last draw check in the record to anyone was dated June 20, 2005. Id. at p. 9.

Sherwin Thingvold explained that at Pro Kote, the employees were paid monthly and after two weeks, or toward the middle of the month, the Thingvolds wrote draw checks to help the employees make it to their next paycheck. He explained that after he went to work for Classic Painting, he traveled from job site to job site and because he did not have access to a checking account for Classic Painting or Edmonds, he wrote a few draw checks to some of the employees. He noted that this practice was more efficient than driving across town to obtain a check from Edmonds. He was then

reimbursed by Edmonds.

At times, the jobs were scattered around the Northwest and Sherwin Thingvold described that employees would be living in a hotel and eating in restaurants and waiting to obtain an advance on their pay. In those situations, Sherwin Thingvold felt the options were (1) to drive back to the Portland area, sometimes 300 miles away, secure a check for the employee and either mail it or deliver it personally; (2) give the employee an advance from his personal funds; (3) give the employee an advance from Pro Kote's checking account. He chose the third option. He did not seek permission from Edmonds to do it because, he explained, it was a prudent way to get the worker money, Edmonds agreed with him, and Edmonds reimbursed the money.

Sherwin Thingvold also explained why plaintiffs' pay stubs for paychecks issued January 2005 through September 2005 bear the same format even though, according to his own testimony, plaintiffs were no longer Pro Kote employees after the spring of 2005. See Exhs 1-4. Before hiring the Thingvolds and plaintiffs, Edmonds did his own payroll for his employees. Edmonds asked Sherwin Thingvold who the Thingvolds hired to prepare Pro Kote's payroll and Sherwin Thingvold gave Edmonds the name of the individual that Pro Kote used to prepare its paychecks. As Sherwin Thingvold explained it, the individual, Bob Blackmore, provided a service to Pro Kote in terms of preparation, but the Thingvolds still hand wrote the checks using the information Blackmore gave them.

Initially, after the Thingvolds became Classic Painting employees, Edmonds used Blackmore in this manner as well. According to Sherwin Thingvold, Edmonds continued to use Blackmore

through September 2005, but then changed to a different payroll administration company because Edmonds grew tired of writing the actual payroll checks longhand. The new company prepared the checks as well as the check stubs and Edmonds only had to sign them.

III. Plaintiffs' Hours

Morga-Colon testified that Pro Kote had a policy of not paying overtime for hours worked in a week beyond 40. According to Morga-Colon, Morga-Colon was one of four employees who met with Sheldon Thingvold, before going to work for Classic Painting, about overtime. Morga-Colon remembered that the meeting took place in the summer, but he could not remember the year or the month. He identified the participants as Sheldon Thingvold, plaintiff Camacho-Oliva, one other individual whose name he could not remember, but who acted as a spokesperson, and himself. According to Morga-Colon, Sheldon Thingvold explained that the Thingvolds could not pay overtime and that if required to pay overtime, the Thingvolds would simply hire additional workers and give everybody only eight hours of work per day. Camacho-Oliva's testimony about this meeting corroborates Morga-Colon's testimony.

Morga-Colon and Camacho-Oliva also testified that after the meeting, they were asked to work overtime, they did so, and were not paid extra pay for the overtime hours worked. Both of these plaintiffs confirmed that this policy continued after they went to work for Classic Painting. While neither one offered specific testimony about specific weeks in which they worked more than 40 hours and for which they did not receive overtime pay, each of these plaintiffs testified to keeping a contemporaneous log of

hours while working for Pro Kote and then Classic Painting, beginning in January 2005 and continuing into January 2008. Exhs. 6, 6A, 7, 7A. Conceivably, by totaling the number of hours recorded in each week, one could determine the weeks in which these plaintiffs worked more than 40 hours.

In contrast to the testimony offered by Morga-Colon and Camacho-Oliva, Rojo-Garcia and Pineda-Marin offered no testimony about the overtime policy or the meeting regarding overtime with Sheldon Thingvold. Neither of these plaintiffs testified to having worked any hours over 40 for which they were not paid overtime. Rojo-Garcia was asked no questions about overtime. Pineda-Marin was asked only if he had ever worked more than 40 hours in a week. He was not asked when, for what employer, nor if he was paid overtime.

Although Rojo-Garcia testified that he kept a log of hours worked, he lost the records. He testified that he worked the same hours as the other three plaintiffs. Notably, however, the records of the other three plaintiffs show that they did not always work the same hours. See, e.g., Exh. 6 at p. 5 and Exh. 7 at p. 6 which show:

MARCH 2006

DATE	Camacho-Oliva Exhibit 6	Morga-Colon Exhibit 7
Weds. March 1	10 hours	7 hours
Thurs March 2	9 hours	7 hours
Fri March 3	10 hours	8 hours
Sat March 4	8 hours	6 hours

At the pretrial conference, several exhibits, including

Exhibit 8, were admitted into evidence. Plaintiffs' Exhibit List identifies Exhibit 8 as Pineda-Marin's timesheets. Exhibit 8 is similar to the logs of work hours kept by Morga-Colon and Camacho-Oliva seen in Exhibits 6, 6A, 7, and 7A.

In testifying about their hours, Morga-Colon and Camacho-Oliva identified the logs, explained they created the logs themselves, testified when they were created, and explained the format of the logs including how the Spanish words appearing there represented the months, and the letters were for the Spanish days of the week. In contrast, Pineda-Marin was never asked a single question about Exhibit 8 or Exhibit 8A and thus, there is no evidence in the record regarding who created the logs in Exhibit 8, when they were created, or what the numbers written there represent.

As to wages simply not paid at all, Morga-Colon testified that he was never paid for certain hours worked in late 2007 and early 2008. Specifically, he stated that he was owed $337.50 for October 2007, $332 for December 2007, and that in January 2008, he worked a total of 48 hours for which he was not paid.

Camacho-Oliva testified that he was owed $332 for hours worked in December 2007 that were not paid, and that he worked 39 hours in January 2008 that have not been paid.

Rojo-Garcia testified that "at the end" he was not paid in full and it seemed like he was still owed wages for 180 hours worked. Pineda-Marin testified that he was not paid completely, but he did not articulate relevant dates. He also could not recall how many hours were unpaid or how much he was owed. He stated that it was "written down in the file," but he never identified "the file," stating only "the one that is here."

CONCLUSIONS OF LAW

I. Thingvolds & Pro Kote as Employers

Under the Fair Labor Standards Act (FLSA), "[e]mployee" is defined as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). "'Employ' includes to suffer or permit to work." 29 U.S.C. § 203(g). "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee[.]" 29 U.S.C. § 203(d).

In a 2009 case, the Ninth Circuit explained that

> [w]e have held that the definition of "employer" under the FLSA is not limited by the common law concept of "employer," but "'is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.'" Lambert v. Ackerley, 180 F.3d 997, 1011-12 (9th Cir. 1999) (en banc) (quoting Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983)). See also Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979). The determination of whether an employer-employee relationship exists does not depend on "isolated factors but rather upon the circumstances of the whole activity." Rutherford Food Corp. v. McComb, 331 U.S. 722, 730, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947). The touchstone is the "economic reality" of the relationship.
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> Where an individual exercises "control over the nature and structure of the employment relationship," or "economic control" over the relationship, that individual is an employer within the meaning of the Act, and is subject to liability. Lambert, 180 F.3d at 1012 (internal quotation marks and citations omitted). In Lambert, we upheld a finding of liability against a chief operating officer and a chief executive officer where the officers had a "'significant ownership interest with operational control of significant aspects of the corporation's day-to-day functions; the power to hire and fire employees; [the power to] determin[e][ ] salaries; [and the responsibility to] maintain [ ] employment records.'" Lambert, 180 F.3d at 1001-02, 1012 (quoting the district court's jury instruction). "The evidence, moreover, strongly supports the jury's determination that both Ackerleys exercised economic and operational control over the employment relationship with the sales agents, and were accordingly employers within the meaning of the Act." Id. at 1012. See also Chao v. Hotel Oasis, Inc., 493 F.3d 26, 34 (1st Cir. 2007) (holding corporation's

> president personally liable where he had ultimate control over business's day-to-day operations and was the corporate officer principally in charge of directing employment practices); United States Dep't of Labor v. Cole Enters., Inc., 62 F.3d 775, 778-79 (6th Cir. 1995) (president and 50 percent owner of corporation was "employer" within FLSA where he ran business, issued checks, maintained records, determined employment practices and was involved in scheduling hours, payroll and hiring employees).

Boucher v. Shaw, 572 F.3d 1087, 1091-92 (9th Cir. 2009).

In Bonnette, cited by Boucher, the court explained that in determining whether a defendant is an "employer" under the FLSA, courts are to consider the totality of the circumstances of the relationship, including whether the alleged employer has the power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records. Bonnette, 704 F.2d at 1470, abrogated on other grounds, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985)). However, the court also noted that these factors are "not etched in stone and will not be blindly applied." Id.

The Bonnette court considered these factors in the context of a "joint employer" argument. The court explained that two or more employers may jointly employ someone for purposes of the FLSA and that all joint employers are individually responsible for compliance with the FLSA. Id.

The Department of Labor's regulation sets forth examples of joint employment situations: (1) where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or (2) where one employer is acting directly or indirectly in the interest of the other employer

(or employers) in relation to the employee; or (3) where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. 29 C.F.R. § 791.2(b).

Bonnette also held that the determination of the status of employer under the FLSA was a question of law. "We agree with the Eighth Circuit and the most recent Fifth Circuit precedent. Although the underlying facts are reviewed under the clearly erroneous standard, the legal effect of those facts-whether appellants are employers within the meaning of the FLSA-is a question of law." 704 F.2d at 1469.

Under these principles, the Thingvolds and Pro Kote were not employers of plaintiffs after the transition to Classic Painting. The facts establish that once the Thingvolds ended their business Pro Kote, they became employee supervisors, acting on behalf of Classic Painting, with regard to plaintiffs. Even accepting that they had more authority than the "team leader" position described by some of the plaintiffs and held by various Classic Painting employees including Duran and Pineda-Marin, the undisputed evidence remains that the Thingvolds did not have the power to hire or fire plaintiffs or discipline plaintiffs.

Certainly, the Thingvolds recommended that Edmonds hire plaintiffs when Classic Painting took over Pro Kote. But, there is no evidence in the record establishing that Edmonds was required to do so or that hiring plaintiffs was part of any bargain struck by the Thingvolds and Edmonds when Classic Painting hired the

Thingvolds. The evidence that the Thingvolds did not have authority to fire or discipline plaintiffs is undisputed.

Similarly, while the Thingvolds had paid plaintiffs a certain hourly wage when the plaintiffs were employees of Pro Kote, Classic Painting was not obligated by any agreement with the Thingvolds to continue to pay plaintiffs those hourly wages. Edmonds could have followed the recommendations of the Thingvolds or not, as he chose. Although Morga-Colon testified that Sherwin Thingvold was responsible for his raise while he was employed by Classic Painting, he failed to explain the basis for his knowledge. The Thingvolds explained that Edmonds and Classic Painting made those determinations, although they may have been asked for a recommendation.

It is also undisputed that Classic Painting issued all of plaintiffs' paychecks beginning sometime in late spring 2005. Beginning in October 2005, the check stubs in the record bear the name of Classic Painting. The only actual check in the record bears Edmonds's signature. Sherwin Thingvold's testimony regarding Edmonds's use of the Thingvolds' payroll administrator for the first several months that Classic Painting employed plaintiffs is undisputed.

Additionally, there is no evidence in the record showing that the Thingvolds maintained any employment-related or payroll records of plaintiffs once Pro Kote ceased to exist, and no evidence they issued any such records, including W-2s or other tax-related employment records.

Thus, while the Thingvolds supervised crews at certain work sites and engaged in certain supervisory-related tasks such as

distributing paychecks, they did not set wages, did not have the authority to hire, fire, or discipline, did not issue paychecks, and did not maintain or generate employment and wage-related documents.

Plaintiffs' testimony that the Thingvolds, in their supervisory roles, had some control over employee work schedules and, in the winter, some control over who worked when painting jobs were more scarce, is largely undisputed. Plaintiffs' daily work logs, however, with the exception of Rojo-Garcia's logs which he apparently lost, show that plaintiffs worked, uninterrupted, close to or more than 40 hours each week, from July 2005 until December 2007 - January 2008. Thus, while plaintiffs testified that the Thingvolds had some authority over work hours in theory, that authority was never apparently exercised to plaintiffs' detriment. This diminishes the weight of plaintiffs' testimony on this issue.

Status as a supervisor and execution of certain duties attendant to that status, e.g. scheduling shifts, collection of hours, distribution of paychecks, recommendations regarding raises, and instruction, are not enough, without more, to make the supervisor an "employer" for purposes of the FLSA. Even given the breadth of the statutory definition, if supervisory status alone rendered a supervisor an FLSA "employer," then every supervisor in every company would be individually liable for FLSA damages as an employer.

Cases support the point that supervisors are considered "employers" under the FLSA only when they exercise something more than common employee supervision. E.g., Chao v. Hotel Oasis, Inc., 493 F.3d 26, 33-34 (1st Cir. 2007) ("not every corporate employee

who exercise[s] supervisory control should be held personally liable [under the FLSA]"; finding that president of corporation who was corporate officer in charge of hiring, firing, attendance at meetings, wages, and schedules was "employer" under FLSA), citing Donovan v. Agnew, 712 F.2d 1509, 1510, 1511, 1513-14 (1st Cir. 1983) (noting it "difficult to accept . . . that Congress intended that any corporate officer or other employee with ultimate operational control over payroll matters be personally liable [under the FLSA]," but concluding that the FLSA did not preclude personal liability for "corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation's day to day functions, including compensation of employees[.]"); see also Rivera-Triado v. Autoridad de Energia Electrica, No. 06-1928(DRD), 2009 WL 3347455, at * 3-4 (D.P.R. Sept. 1, 2009) (absent evidence that the two supervisors were corporate officials, controlling of the business's day to day operations, or were in charge of hiring, firing, and setting wages, they were not "employers" under FLSA definition); Stuart v. Regis Corp., No. 1:05CV00016DAK, 2006 WL 1889970, at *6 (D. Utah July 10, 2006) (noting that definition of "employer" for federal Family Medical Leave Act (FMLA) is the same as that used in the FLSA and holding that supervisor with authority to provide oral and written reviews of employee's performance and issued written warnings, was not "employer" under that definition when supervisor did not hold a corporate officer position; stating that "[i]ndividuals who have no corporate role beyond a managerial position are not employers[.]"); Keene v. Rinaldi, 127 F. Supp. 2d 770, 777 n.3 (M.D.N.C. 2000) ("neither the FLSA nor the FMLA were intended to

impose liability on mere supervisory employees as opposed to owners, officer, etc.").

The use of the Thingvolds' equipment and Sherwin Thingvolds' few occasions of writing a draw check to certain Classic Painting employees in the first couple of months after the transition from Pro Kote to Classic Painting, are not enough to establish the Thingvolds or Pro Kote as employers. The Thingvolds' equipment was not the only equipment used by Classic Painting employees. And, Sherwin Thingvold wrote a total of six draw checks between April 18, 2005, and June 20, 2005. The undisputed evidence is that he was reimbursed by Edmonds. Thingvold's explanation makes sense. Indeed, one pay stub in fact reflects the advance and later deduction in pay. Exh. 503 at p. 7 (Pro Kote check register showing $400 draw check to Morga-Colon on May 18, 2005); Exh. 2 at p. 3 (pay stub dated June 3, 2005 showing $400 draw deducted from wages). When these facts are examined as part of the totality of the circumstances, they do not change the more determinative facts regarding the relatively little economic power the Thingvolds held over plaintiffs after the Thingvolds themselves became employees of Classic Painting. Under the economic realities test used to determine employer status for the purposes of the FLSA, the evidence at trial shows that the Thingvolds and Pro Kote were not plaintiffs' employers.

During closing argument, plaintiffs' counsel noted that in the Pretrial Order, Pro Kote and the Thingvolds agreed with plaintiffs that Morga-Colon, Camacho-Oliva, and Rojo-Garcia were employed by Pro Kote through September 2, 2005. PTO at ¶¶ 3.5, 3.6, 3.7. These parties further agreed that Pineda-Marin was employed by Pro

Kote through May 20, 2005. Id. at ¶ 3.4. Counsel for Pro Kote and the Thingvolds responded that these agreed facts were an oversight on his part, that he had been mistaken in agreeing to them, and that he did not intend to agree to them. He stated that in fact, Pro Kote and the Thingvolds disputed that the plaintiffs were employees of Pro Kote after the transition to Classic Painting in the spring of 2005. These agreed facts also came as a surprise to the Court because during the trial, no one had drawn any attention to these agreed facts or suggested that there was any stipulation regarding a joint employment relationship for any period of time. Rather, the entire case was tried based on the competing theories of plaintiffs (that Pro Kote and the Thingvolds beginning in the spring of 2005 became joint employers of plaintiffs with Classic Painting and Edmonds), as opposed to the Thingvolds' and Pro Kote's theory (that Classic Painting and Edmonds became the only employers of plaintiff and the Thingvolds in the spring of 2005).

Generally, a pretrial order supersedes the pleadings and the parties are bound by its contents. Patterson v. Hughes Aircraft Co., 11 F.3d 948, 950 (9th Cir. 1993); see also Fed. R. Civ. P. 16(d) (pretrial orders issued by the court control the course of the action unless modified by the court); Fed. R. Civ. P. 16(e) (final pretrial order modified by court only to prevent manifest injustice).

Nonetheless, a district court is given broad discretion in supervising the pretrial phase of litigation and "its decisions regarding the preclusive effect of a pretrial order on issues of law and fact at trial will not be disturbed unless they evidence a clear abuse of discretion." Miller v. Safeco Title Ins. Co., 758

F.2d 364, 369 (9th Cir. 1985).

Importantly, a pretrial order may be amended by a trial court's findings when facts supporting those findings are put before the court. Id. at 368; see also Sauers v. Alaska Barge, 600 F.2d 238, 244 (9th Cir. 1979) (court may treat a pretrial order as amended to conform to the evidence as actually presented).

Here, although the Pretrial Order's agreed facts are that three of the plaintiffs were employed by Pro Kote until early September 2005, the Thingvolds both testified that plaintiffs became employees of Classic Painting after March or April 2005, and accordingly, were no longer employed by Pro Kote and the Thingvolds. Plaintiffs did not object to this testimony, even though such an objection would have been well taken. See United States v. First Nat'l Bank of Circle, 652 F.2d 882, 886 (9th Cir. 1981) (one objective of the final pretrial conference and pretrial order is to simplify issues and avoid unnecessary proof by obtaining admissions of fact; thus, a party may not offer evidence at trial which contradicts the pretrial order's terms).

Additionally, this case, compared with many, was in a state of disarray during the time pretrial documents were being drafted and filed, and at the time of the pretrial conference, it was unclear if the case was going to trial as scheduled, and if so, with how many parties. The pretrial conference was scheduled for January 29, 2010, with pretrial documents due on January 4, 2010, January 11, 2010, and January 19, 2010. The Pretrial Order was due on January 4, 2010.

On December 29, 2009, counsel for Classic Painting and Edmonds filed a motion to withdraw as counsel for Edmonds, citing Edmonds's

recent retention of a bankruptcy attorney in connection with the pending claims against him, and the potential conflict for counsel to continue to represent both the corporate defendant and Edmonds. On January 8, 2010, I denied the motion with leave to renew it at a later date. At this point, the impending bankruptcy of Edmonds and the possible withdrawal of his counsel created some uncertainty about the trial date. Moreover, there was some suggestion that the Thingvolds may file for bankruptcy as well, although it was not clear if that would occur, if at all, before or after the trial.

Nonetheless, the pretrial conference was held as scheduled. During that pretrial conference, the parties waived a jury and decided to proceed with a trial to the court. The parties also discussed the impact of a bankruptcy filing by Edmonds, which had not yet occurred, and whether plaintiffs would dismiss him from the case upon such filing. It was also revealed that due to the financial circumstances of all the parties in the case, no depositions had ever been taken.

Seven days after the pretrial conference, the Court learned of the "settlement" between Classic Painting, Edmonds, and plaintiffs. As it turns out, the settlement was actually an agreement that a stipulated judgment against Classic Painting and Edmonds would be entered, but no immediate or voluntary payment of money by these defendants to plaintiffs was contemplated. Plaintiffs were to tender a proposed judgment against Classic Painting and Edmonds to the Court on February 8, 2010. None has been tendered as of March 25, 2010, at 9:30 a.m.

Finally, the agreed facts in the Pretrial Order are a bit confusing. They appear in a section labeled "3. AGREED FACTS."

Pretrial Order at p. 2. Following this is a sentence reciting that plaintiffs, Pro Kote, and the Thingvolds "agree to the following facts:". Then, several numbered facts, from 1 to 7, appear. Id. After this is a sentence reciting that plaintiffs, Classic Painting, and Edmonds "agree to the following facts:". Then, several numbered facts, from 1 to 17, appear. Id. at p. 3. Several of the agreed facts to which Pro Kote and the Thingvolds agreed actually address issues relevant only to Classic Painting and Edmonds. Id. at p. 2. It is unclear why they are in this section. Moreover, given that the parties represented at the pretrial conference that no depositions had been taken, the basis for agreeing to certain facts is unclear.

Given the evidence presented regarding the time period when the Thingvolds and Pro Kote no longer employed plaintiffs, and the lack of objection to it, I consider the Pretrial Order amended to conform to the evidence actually presented at trial and thus, I do not find the agreed facts on this issue preclusive. My determination is influenced by the general confusion surrounding the case in the weeks immediately preceding the trial, including the confusing presentation of the agreed facts in the Pretrial Order itself. While I do not excuse the lack of attention to detail by counsel for Pro Kote and the Thingvolds, I note the confusing circumstances as a way of explanation and as support for finding the Pretrial Order amended.

Alternatively, even if I accepted the agreed facts regarding the duration of Pro Kote's employment of plaintiffs, those facts create no liability for Pro Kote. The Complaint in this case was filed on July 2, 2008. The Oregon statutory claims, discussed more

fully below, carry two-year statutes of limitations. Oregon Revised Statute § (O.R.S.) 12.110(3). Thus, even if Pro Kote and the Thingvolds were plaintiffs' employers up to September 2, 2005, there is no liability, under Oregon statutory wage law, for any conduct occurring before July 2, 2006.

The FLSA also carries a two-year statute of limitations. 29 U.S.C. § 255(a). However, in the case of a willful violation, the limitations period is extended to three years. Id. Plaintiffs here have no minimum wage claims in the period July 2, 2005, to July 2, 2006. Thus, any willfulness triggering a three-year FLSA statute of limitations must relate to the failure to pay overtime.

"A violation of the FLSA is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 919 (9th Cir. 2003) (internal quotation and brackets omitted). In this case, there is no dispute that even if the Thingvolds and Pro Kote were considered "employers" of three of the plaintiffs until September 2, 2005, they were not authorized to execute paychecks and were not responsible for wage policy. Although the testimony regarding the Thingvolds' overtime policy while plaintiffs were employed solely by Pro Kote would establish willfulness sufficient to trigger the three-year limitations period, there is no evidence that the Thingvolds and Pro Kote, as opposed to Edmonds, were responsible for maintaining and enforcing that policy after April or May 2005. Therefore, even accepting the agreed fact that Morga-Colon, Camacho-Oliva, and Rojo-Garcia were employed by Pro Kote until September 2, 2005, in this situation of joint employment with Classic Painting, the willfulness required to

extend the limitations period from two to three years cannot be attributed to the Thingvolds under the facts of this case. Accordingly, even if the Thingvolds and Pro Kote employed these three plaintiffs until September 2, 2005, there is no liability for the overtime violations during that time period.

As to the non-FLSA claims, the definition of "employer" under the Oregon statute for purposes of plaintiffs' minimum wage and overtime claims, is "any person who employs another person . . . ." O.R.S. 653.010(3). "'Employ' includes to suffer or permit to work[.]" O.R.S. 653.010(2). As with the FLSA, the determination of employer status for Oregon wage claims is a question of law. Roberts v. Bomareto Enters., Inc., 153 Or. App. 183, 186, 956 P.2d 254, 255 (1998).

Oregon cases do not clearly articulate the proper analysis used to determine the status of "employer" under O.R.S. 653.010(3). In Chard v. Beauty-N-Beast Salon, 148 Or. App. 623, 941 P.2d 611 (1997), the court noted that courts in earlier cases and the Oregon Bureau of Labor and Industries (BOLI) used the common law "right to control" test when "distinguishing an employee from an independent contractor for purposes of ORS chapter 653." Id. at 628, 941 P.2d at 613. In Bomareto, the court recognized that the provisions and definitions in O.R.S. Chapter 653 are patterned after the FLSA. Bomareto, 153 Or. App. at 187 n.3, 956 P.2d at 255 n.3. However, the court had no reason to further explain the factors or test used to determine "employer."

In Roberts v. Acropolis McLoughlin, Inc., 149 Or. App. 220, 942 P.2d 829 (1997), the court noted that under the FLSA, the "employment relationship" test is one of "economic reality." Id.

at 224, 942 P.2d at 831. On appeal to the court, BOLI argued that the trial court erred by including elements of the common law right to control test because, according to BOLI, only the economic realities test applied. Id. at 226, 942 P.2d at 832. The court refused to decide the issue because it had not been raised before the trial court.

Under the economic realities test as articulated by the Ninth Circuit for FLSA claims, Pro Kote and the Thingvolds are not employers. If this is the proper test used for Oregon statutory wage claims, these defendants are not employers under Oregon law. If the common law right to control test is used, however, the Thingvolds and Pro Kote are still not employers. The Thingvolds, after they became employees of Classic Painting, did not retain the right to hire, fire, or discipline employees. They did not pay plaintiffs. They furnished some, but not all, of the equipment. They supervised certain parts of the plaintiffs' work, but other team leaders also shared in some of that responsibility. Viewed in totality, the Thingvolds and Pro Kote did not exercise sufficient control under the common law "right to control" test, to be considered employers under O.R.S. Chapter 653.

As to the late payment of termination claim under O.R.S. 652.140, "employer" is not separately defined in the statutes. However, because the statute addresses the payment of wages on termination, it presupposes an employment relationship and there is no basis for defining "employer" any differently than for the wage claims found in O.R.S. Chapter 653. For the reasons previously articulated, the Thingvolds and Pro Kote are not employers for the purposes of the O.R.S. 652.140 claim.

Finally, as to the breach of contract claim, plaintiffs fail to establish that they had an employment contract with Pro Kote and the Thingvolds in 2007 and 2008, the time period for which they seek unpaid wage damages under the contract claim.

II. Issues with Proof of Damages

Given my conclusion that the Thingvolds and Pro Kote were not employers for any of plaintiffs' claims, I need not address any issues related to damages. However, for the benefit of the parties, I note that should it be necessary to analyze the damages claims in this case, the following are issues of concern:

(1) Testimony: as noted above, Rojo-Garcia and Pineda-Marin failed to testify that they were not paid one and one-half times their regular hourly rate for hours worked in excess of 40 in one week. Rojo-Garcia has no written log of hours to rely on in place of testimony. His testimony that he worked the same hours as the other three plaintiffs is not reliable given that the logs of the other three plaintiffs show that they occasionally worked different hours from each other. Pineda-Marin gave no testimony whatsoever about the logs in Exhibit 8, making them of no value.

Additionally, Pineda-Marin gave no testimony as to the number of hours he worked in 2007 and 2008 that were unpaid. The basis for Rojo-Garcia's testimony that he worked 180 unpaid hours in that time period was not established and his testimony on this issue is questionable given that he has no written records, could not remember how much money he was owed for these unpaid hours, and testified that it "seemed" like there were 180 unpaid hours. This evidence does not establish a credible, just and reasonable estimate of hours worked.

Although in the absence of records kept by an employer, a plaintiff in an FLSA wage case carries his burden of showing uncompensated hours with evidence establishing the amount and extent of work by "just and reasonable inference," Anderson v. Mount Clemens Pottery Co., 238 U.S. 680, 687 (1946), Pineda-Marin and Rojo-Garcia's testimony as to overtime and unpaid pages fails to meet that burden.

(2) Exhibits 6, 6A, 7, 7A, 8, 8A

At the pretrial conference, I received plaintiffs' Exhibits 6, 7, and 8 into evidence. Plaintiffs identified the exhibits as follows: Exhibit 6: Timesheets of Camacho-Oliva; Exhibit 7: Timesheets of Morga-Colon; Exhibit 8: Timesheets of Pineda-Marin. At that time, the Court and the parties had before them copies of logs of hours maintained by plaintiffs. Exhibits 6 and 7 showed that the logs had been made in spiral notebooks. The copy of Exhibit 8 did not reveal if the logs were kept in a bound notebook, a pad of paper, or on a series of single sheets of paper.

The first morning of trial, when, pursuant to the trial management order, the parties are expected to bring the originals of exhibits with them for use by witnesses, plaintiffs' counsel presented only copies of these exhibits. During trial, I inquired about the original logs. The following morning, plaintiffs' counsel tendered what were then marked and received as Exhibits 6A, 7A, and 8A. Exhibits 6A and 7A are the actual spiral bound notebooks. Exhibit 8A is the original single pages of paper held together with a paper clip.

In discussions with counsel, on the record, I noted one discrepancy between Exhibit 6 and Exhibit 6A in that Exhibit 6A had

two pieces of paper for "Enero 2008" (meaning January 2008), one of which was torn loose from the spiral binding, but was still in the notebook. Both showed the same days of the week, January 2d through 10th, 2008, and both showed the same hours worked, although the loose sheet has two days which were corrected. The loose sheet also contains writing at the bottom of the log which recites "TOTAL 39 hrs. TOTAL $507." The sheet for January 2008 which is still bound to the notebook does not contain the total. It does, however, contain the words "debe todo" next to the entry for January 4, 2008. Although not officially translated by the interpreter used for this trial, plaintiffs' counsel offered that the meaning of "debe todo" is "total owed."

As for Exhibits 7 and 7A, there are also some inconsistencies between the copy and the original bound notebook. Page 28 of Exhibit 7 is a log for "ENE 08," meaning January 2008. It follows the page on which hours for October, November, and December 2007 were kept. Exh. 7 at p. 27. Page 28 has the year 2008 written in the middle of the top margin, and Morga-Colon's name written on the top right corner. It lists the numbers 2, 3, 4, 7, 8, 9 down the left side, with, presumably, the number of hours worked each one of those days. At the bottom is written "TOTAL = 48 horas Debe Todo." Exh. 7 at p. 28.

The corresponding page in the original spiral notebook follows the page on which hours for October, November, and December 2006, not 2007, were kept. Exh. 7A. Additionally, the corresponding page in the original exhibit says "ENERO 2008," not "ENE 08." Id. And, in the original exhibit, the words "TOTAL = 48 horas Debe Todo" do not appear anywhere on that page. Id.

Adding to the confusion is a page in the original notebook which almost matches page 28 of Exhibit 7, except for the absence of the words "TOTAL = 48 horas Debe Todo." This page is torn from the spiral binding and is tucked in after the last page on which hours are recorded. Id.

Finally, as to Exhibits 7 and 7A, the original notebook in Exhibit 7A contains two pages which appear to total hours, by month, for years 2005, 2006, and 2007. Id. One of them shows monthly hours well over 100, with the exception of July and August 2006. Id. The other has headings 205, 206, 207, instead of 2005, 2006, and 2007, and shows significantly fewer hours each month. Id. Only the first of these pages appears in Exhibit 7. Exh. 7 at p. 29. There is no explanation for the difference or what is represented on the second of the two pages in Exhibit 7A.

As to Exhibits 8 and 8A, the most noticeable difference between the two is that the pages in Exhibit 8 are not in any chronological order while in Exhibit 8A, they begin with January 2005 and proceed, more or less one month to a page, through December 2007, with the final page containing hours for both January and February 2008. Exhibit 8A has one page with hours for July 2005 continued on the back of the page. This page is missing from Exhibit 8.

Curiously, although Morga-Colon and Camacho-Oliva testified that they created the logs by writing their hours worked each day, all of the entries for the three-year period of January 2005 to January 2008, look to have been made by the same pen. Exh. 6A, Exh. 7A. This is also the appearance of the log kept by Pineda-Marin. Exh. 8A.

Although under Federal Rule of Evidence 1003 a duplicate may be used in place of an original, the discrepancies between the originals (Exhibits 6A, 7A, 8A), and the duplicates (Exhibits 6, 7, 8) in either content or form indicate that the originals should be used. Given the manner in which these logs were kept by writing entries in the same manner every day for three years with what appears to be the same pen, I question the accuracy of the testimony that these logs were made contemporaneously with the hours worked. If indeed they were not contemporaneously made, I have no confidence in the accuracy of the data these logs contain and in fact, the credibility of plaintiffs is seriously undermined.

(3) Exhibit 8

I have previously mentioned the lack of testimony by Pineda-Marin regarding Exhibit 8. Even though the exhibit was received, without any testimony by Pineda-Marin or anyone else about who kept the records and that they are an accurate record of the hours he worked, and that the record was generated when the information was fresh in his mind, the information contained in the exhibit carries no weight.

(4) Weeks with Unpaid Overtime Hours

Although Morga-Colon and Camacho-Oliva testified that they worked more than 40 hours in one week and did not receive one and one-half times their regular wage for such hours, they did not specify the exact weeks in which this occurred. Presumably then, plaintiffs left this determination up to the factfinder who then has to comb through each of the logs in Exhibits 6 or 6A, or Exhibits 7 or 7A, and manually add up the hours in each week to determine which weeks were weeks in which these plaintiffs were not

paid overtime, and how many total hours of overtime are in evidence. While Morga-Colon and Camacho-Oliva both testified that they received raises at some point while working for Classic Painting, they did not testify when those raises occurred, making it impossible for the factfinder to determine, based on testimony and the logs, what hourly rate to use to calculate the overtime owed, if the weeks in which overtime occurred can be reliably determined.

Although in theory it might be possible for the factfinder to determine the hourly rate by looking at the pay stubs in Exhibits 1 (Camacho-Oliva) and 2 (Morga-Colon), the pay stubs are not entirely clear on this point. For example, the pay stub dated March 4, 2005 for Camacho-Oliva shows a rate of $12 per hour. Exh. 1 at p. 2. The pay stub dated August 2, 2005, shows a rate of $12.32 per hour and the one dated September 2, 2005, shows a rate of $13.30 per hour. Id. at p. 4. Between October 2005 and March 2006, the following hourly rates appear on the pay stubs for Camacho-Oliva: $13, $13.98, $13.78, $14.10, and $13.66. Id. at pp. 5-7. From March 2006 until December 2007, the rate holds steady at $13 per hour. Id. at pp. 8-20.

Another factor complicating the calculation is that the pay stubs dated June 2005 through October 2006 do not reveal the pay period for which the pay check was issued. Id. at pp. 3-11. Because the pay stubs during this period of time were apparently issued monthly, it is reasonable to assume that the July 1, 2005 pay stub, for example, likely accompanied a paycheck issued for hours worked in June 2005, the preceding month. The July 1, 2005 pay stub shows a total of 200 hours worked. Id. at p. 3. Based on

the reasonable assumption that these were hours worked in June 2005, one would expect that the log kept by Camacho-Oliva for hours worked in June 2005, would total 200. It does not. Rather, the log in Exhibit 6 shows that Camacho-Oliva worked 205 hours in June 2005. Exh. 6 at p. 2.

Curiously, while the July 1, 2005 pay stub shows 200 hours worked in some undefined pay period, the log in Exhibit 6 shows 200 hours worked in July 2005. Compare Exh. 1 at 3 with Exh. 6 at p. 3. And, the June 3, 2005 pay stub shows 205 hours worked in some undefined pay period while the log in Exhibit 6, as noted above, shows 205 hours.

Unless plaintiffs were being paid in advance, which is not the testimony, the fact that the June 3, 2005 pay stub shows 205 hours worked and the log kept for June 2005 shows 205 hours worked, and the fact that the July 1, 2005 pay stub shows 200 hours, and the log kept for July 2005 shows 200 hours worked, reasonably suggests that plaintiffs created the logs after the fact by looking at the total hours worked on the pay stub for a particular month, and then listing in their logs the daily hours for that month that equaled the total on the pay stub. Because this is the most reasonable inference created by this evidence, plaintiffs' testimony that their logs were created contemporaneously with the days actually worked, is completely undermined.

Another problem is found in the pay stubs starting October 31, 2006, and continuing through December 2007. Exh. 1 at pp. 12-20. These pay stubs do reveal a start and end date of the relevant pay period. Id. Nonetheless, there are problems with some of the records. The first one in this sequence shows a start and end day

of October 31, 2006. Id. at p. 12. Given that the prior pay stub is dated October 3, 2006, and following the assumption noted above, was presumably for the pay check covering hours worked in the month of September 2006, it is possible that the October 31, 2006 start day was a mistake and should have been October 1, 2006, with an ending date of October 31, 2006. However, the total hours worked indicated on that pay stub is 104, while the log of hours kept by Camacho-Oliva for the month of October 2006, is 194.5. Thus, the pay stub with the start and end date of October 31, 2006, remains unclear.

Additionally, while the pay stubs for pay periods beginning November 1, 2006, then appear semi-monthly, there are gaps and other problems. There is no pay stub for the period December 16, 2006, to December 31, 2006, or for the period January 1, 2007, to January 15, 2007. The stubs resume for the period January 16, 2007, to January 31, 2007, and then for two periods in February 2007. Exh. 1 at pp. 14-15. Next is a pay stub covering the period March 1, 2007, to March 16, 2007, showing pay for 89.5 hours worked, followed by one covering the period March 10, 2007, to March 15, 2007, showing pay for 109.5 hours worked. Id. at pp. 15-16. There is no explanation for this overlap.

Then, there is a pay stub for the period April 1, 2007, to April 15, 2007, showing pay for 101 hours worked, followed by a pay stub for April 1, 2007, to April 30, 2007, showing pay for 212 hours worked. Again, there is no explanation for this overlap.

Given my conclusion that the Thingvolds and Pro Kote are not employers for the purposes of any of plaintiffs' claims, I need not provide details of similar problems with the other exhibits

containing pay stubs and the attempt to cross-reference the pay stubs with the log of hours worked. The examples noted above are enough to show that the factfinder's attempt to accurately determine the number of overtime hours worked as a matter of just and reasonable estimate and which were not paid, is not possible on the record submitted at trial.

(5) Penalty Wages

Finally, even if the Thingvolds and Pro Kote were determined to be joint employers with Classic Painting, plaintiffs are limited in the amount of penalty wages they may collect under Oregon law. First, if plaintiffs succeed on their minimum wage or overtime claims under Oregon law, they are entitled to penalty wages under O.R.S. 652.150, which provides, essentially, a penalty wage of eight hours of the employee's wages multiplied by thirty days. Following Magistrate Judge Stewart's well-reasoned opinion in Mathis v. Housing Auth. of Umatilla County, 242 F. Supp. 2d 777, 787 (D. Or. 2002), plaintiffs here cannot obtain penalty wages under O.R.S. 652.150 for overtime or minimum wage violations and also seek to extend the FLSA's two-year statute of limitations to three years because both the O.R.S. 652.150 penalty wages and the willfulness determination required to extend the FLSA's limitations period, are penal in nature and the law does not tolerate the duplicate penalty. Id. at 790.

Second, although the cases are a bit more complicated to synthesize, I am convinced that in the end, plaintiffs cannot recover penalty wages under O.R.S. 652.150 for the overtime violation under O.R.S. 653.261 and allowed under O.R.S. 653.055, and simultaneously recover penalty wages under O.R.S. 652.150 for

the separate violation of late payment of termination under O.R.S. 652.140 because, for the overtime claim, the violations are based on the same conduct. That is, to the extent the separate O.R.S. 652.140 violation is based on the failure to pay the overtime allegedly owed under O.R.S. 653.251, there is a double recovery for the same conduct. See Mathis, 242 F. Supp. 2d at 788 (explaining that when the defendant committed only one wrongful act of failing to pay overtime, the plaintiff was limited to recovery of only one penalty under O.R.S. 652.150; a violation of the overtime statute did not automatically trigger a second violation of the statute requiring prompt payment of all wages due and owing at termination).

The same does not hold true, however, for the penalty wages assessed for the violation of the state minimum wage statute. The distinction is that because plaintiffs have still not been paid for certain hours worked in late 2007 and early 2008, they were not paid for those hours by their next regular payday. This establishes a separate violation of the failure to pay those wages in addition to the initial failure to pay them. Thus, if the Thingvolds and Pro Kote were plaintiffs' employers, plaintiffs could likely recover penalty wages for the state minimum wage violation and also recover penalty wages for the late payment of wages upon termination, to the extent that the latter claim is based on the unpaid minimum wages and not the unpaid overtime wages. See Pascoe v. Mentor Graphics Corp., 199 F. Supp. 2d 1034, 1063 (D. Or. 2001) (when the plaintiff not only received a late payment under O.R.S. 652.140, but also was not paid by his next regular pay date, the latter failure was a separate violation which

would, by itself, allow for recovery of a penalty for failure to pay minimum wages under O.R.S. 653.055 and thus, there was support for the imposition of penalty wages for violating both O.R.S. 652.140 and O.R.S. 653.055).

In summary, even if plaintiffs succeeded in establishing that the Thingvolds and Pro Kote were joint employers with Classic Painting after May 2005, there are substantial problems with their proof of damages which keep them from recovering any of the unpaid wages they contend are owed. Moreover, even if they established the amount of actual unpaid wages, they are not entitled to all of the penalty wages they seek.

CONCLUSION

Plaintiffs fail to establish that the Thingvolds and Pro Kote were joint employers. Judgment is awarded to the Thingovlds and Pro Kote on all of plaintiffs' claims.

IT IS SO ORDERED.

Dated this 25th day of March, 2010.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge